EXECUTIVE SESSION

NOMINATION OF BRADLEY A. SMITH, OF OHIO, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION—Resumed

The PRESIDING OFFICER. The Senate will now proceed to executive session, and the clerk will report the nomination.

The legislative clerk read the nomination of Bradley A. Smith, of Ohio, to be a member of the Federal Election Commission.

Mr. FEINGOLD. Mr. President, it is my understanding under the unanimous consent agreement I am allotted 10 minutes.

The PRESIDING OFFICER. The Senator is correct.

Mr. FEINGOLD. Mr. President, I regret, even though this is the time that has been allocated by unanimous consent for the final debate on the nominations, particularly the nomination of Brad Smith, I regret there are no other Senators here to debate the nomination. However, I will proceed in any event because it is an important nomination, an important issue.

There is an irony about the vote we are about to have in the Senate. The Senate is sure to close up shop at a reasonable hour today. Why? Because tonight the Democratic Party will host the largest fund-raiser in history at the MCI Center here in Washington. The party expects to rake in $24 million in one night, tonight. And this will surpass the previous record for a single fund-raiser of $21.3 million set less than 1 month ago by the Republican Party. That record fundraiser swamped the previous record, also held by the Republican Party, at an event a year earlier, of $14 million.

We are in an arms race. The escalation is truly staggering. The insatiable need for bigger and bigger checks is turning our great political parties into little more than fundraiser machines. Forty-seven donors raised or contributed $250,000 or more to go to the fundraiser tonight that my party will hold. Back in April, 45 donors raised or contributed that amount to join the Republican Party leaders at the National Armory. A quarter of a million dollars. Can anyone honestly say the donors who give that money will get no special treatment in return? We all know this money can be corrupting. It certainly provides the appearance of corruption.

The Supreme Court knows that contributions of this size can be corrupting. Let me quote the Court, once again, from the Shrink Missouri case decided a few months ago:

> There is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.

There is little reason to doubt the corrupting influence of large contributions on our political system, said the Court.

At least one person doubts this. Professor Bradley Smith doubts it. Listen to what he wrote in a 1997 Law Review article: Whatever the particulars of reform proposes, it is increasingly clear that reformers have overstated the Government interest in the anticorruption rationale. Money's alleged corrupting effects are far from proven, Professor Smith says.

Brad Smith sees nothing wrong with unlimited contributions to parties or even to candidates. He said in a newspaper article that ''people should be allowed to spend whatever they want on politics.'' In an interview on MSNBC he said: ''I think we should deregulate and just let it go. That is how our politics was run for over 100 years.''

That ''100 years'' he is referring to is the 19th century. That is the world Brad Smith would like to see; no contribution is too big for us to tolerate in the world he sees.

I assure my colleagues that this is not some caricature of this nominee's views. These are not distortions nor are they words taken out of context. This is what this nominee believes. This is what he has said over and over and over again, including at his confirmation hearing before the Rules Committee. Brad Smith sees nothing wrong with the enormous soft money contributions that both parties are so greedily seeking, the kind of contributions my party will rake in, in the largest fundraiser in history, tonight, just a few hours from now. Not only that, he believes to ban soft money would violate the first amendment of the Constitution.

Virtually no one still clings to that belief in the wake of the Supreme Court's decision in the Shrink Missouri case. Brad Smith does.

This nomination may be just as important to the cause of campaign finance reform as any bill that has been before the Senate in recent years. This vote on this nomination is just as significant for campaign finance reform as many of the votes we have had on those bills. I submit to those Senators who have voted time and time again to ban soft money—and I do thank them for their votes, and I thank them for their support of the McCain-Feingold bill—those Senators should think very carefully about what they are doing here.

To confirm Brad Smith to a seat on the FEC is to confirm a man whose most deeply held beliefs about the Federal election system are wholly at odds with the reforms we are seeking. If we somehow are able to get past the filibuster and pass a soft money ban this year, Brad Smith will be on the Commission that is charged by law with the duty to implementing that ban.

I emphasize again I hold absolutely no personal animus toward Mr. Smith. This is not personal. It is not a matter of personality. I do not question Mr. Smith's integrity. I do not question his honesty. I certainly do not question his right to criticize the laws from outside his perch as a law professor and commentator. However, his views on the very laws he will be called to enforce scare me. It is simply not possible for me to ignore the views he has repeatedly and stridently expressed simply because he now claims he will faithfully execute the laws if he is confirmed. He may try to do that, but in matters of interpretation he will certainly come down on the side of big money in campaigns every time.

In a 1997 opinion piece in the Wall Street Journal, Mr. Smith wrote the following:

> When a law is in need of continual revision to close a series of ever-changing ''loopholes,'' it is probably the law, and not the people, that is in error. Most sensible reform is a simple one: Repeal of the Federal Elections Campaign Act.

I cannot in good conscience vote to confirm a man to the FEC who believes the statute that created that body should be scrapped. I urge my colleagues to think about this very hard. Professor Smith's views are not anywhere near the mainstream of legal thought on this issue. Professor Smith may be a wonderful professor and scholar, but he should not be on the Federal Election Commission.

I reserve the remainder of my time.

Mr. KOHL. Mr. President, I have serious concerns about confirming Bradley Smith to fill a vacancy on the Federal Election Commission or the FEC. The FEC is an independent regulatory agency entrusted with administering and enforcing the Nation's campaign finance laws. Yet, Bradley Smith believes that the very campaign finance laws he would be required to administer and enforce should be thrown out.

I am not questioning the integrity of this nominee or his fitness for government service in general. I also believe we must be careful not to reject nominees just because we object to their views. However, when a person like Bradley Smith is put forward, a person whose views seem to undermine the very purpose for which he is being nominated, I believe we have a responsibility to speak out. Bradley Smith is not an appropriate choice for FEC commissioner and I will be voting against this nomination.

Mr. LEVIN. Mr. President, I will be voting today against the nomination of Mr. Bradley Smith to serve as a Commissioner of the Federal Election Commission. It is with a fair amount of reluctance that I take this position, given the longstanding custom of allowing each party to appoint its own choices to this six member commission and the fact that FEC nominees are, by statute, supposed to be the representatives of their political parties on that commission. I respect that history.

I also believe Mr. Smith is a man of intelligence, integrity, and competence. So, my vote against his nomination is not a vote against him as a person. Nor will I vote against him because I disagree strongly with most of Mr. Smith's opinions on the campaign

finance system. He favors no contribution limits; I think they are essential. He doesn't see a link between corruption or the appearance of corruption and the contributions made to candidates and holders of public office; I do. He thinks the Federal Election Campaign Act and the Federal Election Commission should be dismantled; I don't.

The reason I will vote ''no'' is because I cannot support the nomination of an individual to the position of commissioner of an agency which the nominee doesn't think should exist or which has as its operating statute one which the nominee thinks should be repealed. I do not relish voting against this nominee to the FEC offered by the Republican leadership but Mr. Smith's opposition to the existence of the institution to which he is being nominated compels me to vote against him.

Mr. MCCONNELL. Mr. President, I rise today in support of the nomination of Professor Bradley A. Smith to fill the open Republican seat on the bipartisan Federal Election Commission. In considering the two FEC nominees, Professor Brad Smith and Commissioner Danny McDonald, the Senate must answer two fundamental questions:

Is each nominee experienced, principled and ethical? And,

Will the FEC continue to be a balanced, bipartisan commission?

I want to take a minute to rebut some of the myths that have been perpetuated by the reform groups over the past several months.

Myth No. 1: Professor Smith's First Amendment views are radical and disqualify him for government service at a bipartisan agency.

Over 30 renowned First Amendment and Election Law experts, including past members of the governing Board of Common Cause, urge Brad Smith's confirmation and attest to the validity of Brad Smith's actual views—that is distinguished from the views that have been attributed to him by his critics.

Moreover, these renowned scholars are indignant about the misrepresentation of Smith's scholarship. Let me share just a few examples:

First Amendment Scholar Michael McConnell of the University of Utah Law School writes:

> [S]ome opponents of the nomination of Bradley A. Smith to the Federal Elections Commission are claiming his scholarly writings regarding the First Amendment and campaign finance laws are irresponsible or otherwise beyond the pale. This is simply partisan nonsense. * * * The merits of his nomination should not be clouded by charges of this sort, which have no scholarly validity.

Professor Daniel Kobil, a former governing Board Member of Common Cause in Ohio writes:

> I believe that * * * [the] opposition is based not on what Brad has written or said about campaign finance regulations, but on crude caricatures of his ideas that have been circulated.

Even one of the scholars who support McCain-Feingold has written in support of Professor Smith's nomination. Professor Jamin Raskin, a signatory to the McCain-Feingold letter, writes:

> The political reform community would actually be better off with Smith on the FEC. * * * Smith is no party hack, but a serious scholar who cares about political liberty. * * * He is a dream candidate * * * [who] should not be opposed by political reformers.

In fact, Smith's views on election law are shared by many fine scholars, like Kathleen Sullivan, the Dean of Stanford Law School, who praised Smith stating:

> I do think Mr. Smith's views are in the mainstream of constitutional opinion. I like to think that I am enough in the mainstream of constitutional opinion that our agreement on many points would place us both there.

Let me paraphrase Dean Sullivan to rebut those who argue that appointing Brad Smith is like appointing a conscientious objector to be Secretary of Defense: appointing a First Amendment election law scholar to the FEC is, in fact, like appointing a seasoned U.S. Attorney who values the constitutional liberties of every American citizen.

Or what about 46 political scientists who echo Smith and Sullivan's concerns about the current campaign finance laws and some of the proposed reforms? I ask unanimous consent that a letter be printed in the RECORD at the conclusion of my remarks. It is signed by 46 political scientists, including esteemed scholars like Brandice Canes of MIT, Michael Munger of Duke, Patrick Lynch of Georgetown, and—from the flagship university in Arizona—University of Arizona professors Price Fishback and Vernon Smith.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

Mr. MCCONNELL. Would my colleagues on the other side vote to reject all of these individuals, including the Dean of Stanford Law School, who have questioned the wisdom and workability of our campaign finance laws and the proposed reforms?

Myth No. 2: Professor Smith fails to acknowledge the Supreme Court's recent decision in Shrink-Pac.

As for this assertion, I would direct my colleagues to pages 20, 31, 36 and 40 of the published Rules Committee hearing report from March 8 of this year. Professor Smith clearly acknowledged the holding of the Shrink PAC decision, and, in particular explained:

> Had I been on the Commission and the case had come forward under Federal law . . . I would have had no problem voting for [the] enforcement action . . . .

Of course, the reform groups won't tell you that the Supreme Court agreed with Smith's views and declared campaign finance laws unconstitutional in cases such as Colorado Republican, and McIntyre v. Ohio, and just last year in Buckley v. American Constitutional Law Foundation, or that, as Professor Nagle of Notre Dame Law School has written: Smith's ''understanding of the First Amendment has been adopted by courts in sustaining state campaign finance laws.''

Myth No. 3: Professor Smith will not enforce the law.

The letter of Dan Lowenstein of UCLA Law School, a 6 year member of the national governing Board of Common Cause rebuts this myth. He writes:

> [Smith] will understand that his job is to enforce the law, even when he does not agree with it. I doubt if anyone can credibly deny that [Smith] is an individual of high intelligence and energy and unquestioned integrity. When such an individual is nominated for the FEC, he or she should be enthusiastically and quickly confirmed by the Senate.

Let me address the Democrats' nominee, Commissioner Danny McDonald.

Commissioner McDonald and I are clearly in different campaign reform camps. If I follow the new litmus test that is being put forth by some in this confirmation debate, then I have no choice but to vigorously oppose his nomination.

I want to be clear that Danny McDonald is not my choice for the Federal Election Commission. I have serious questions about his 18-year track record at the FEC. McDonald's views and actions have been soundly rejected by the federal courts in dozens of cases.

Two of these cases even resulted in the U.S. Treasury paying fines because the action taken by McDonald and the FEC was ''not substantially justified in law or fact.'' And, just this month, the 10th Circuit struck down yet another FEC enforcement action as unconstitutional—finding, I might add, that reformer concerns of corruption were unsubstantiated.

I think Commissioner McDonald's voting record has displayed a disregard for the law, the courts and the Constitution. And, it has hurt the reputation of the Commission, chilled constitutionally protected political speech, and cost the taxpayers money.

Equally troubling, is the fact that Commissioner McDonald apparently chose to pursue the chairmanship of the Democratic National Committee while serving as a commissioner to the Federal Election Commission.

I must say that I have serious questions about whether an FEC Commissioner exhibits ''impartiality and good judgment'' when he seeks the highest position in his political party and simultaneously regulates that party and its candidates—and regulates the competitor party and its candidates.

All of that being said, I am prepared to reject this new litmus test whereby we ''Bork'' nominations to this bipartisan panel. I am prepared to follow the tradition of respecting the other party's choice and to support Commissioner McDonald's nomination—assuming that McDonald's party grants similar latitude to the Republicans' choice, Professor Smith, which will be voted on first.

As an aside, let me say to my distinguished colleague from Arizona and my distinguished colleague from Wisconsin: even though we are in different

campaign reform camps and even though we famously disagree on the First Amendment and federal election law, I would wholeheartedly support either of you to serve as the Democrat's nominee to the Federal Election Commission.

I urge my colleagues to also reject this new litmus test of barring government service for those who question Congress and its laws. Harvard Law professor and former solicitor general of the United States, Charles Fried, has summed up this point. This is what Solicitor Fried had to say:

I address . . . the proposition that because [Professor Smith] has been critical of the Commission to which he has been nominated and some of the laws which it administers he is somehow disqualified for confirmation to the post of Commissioner. This argument is not only dangerous, but so far-fetched, so out of line with historic practice, that it is hard to believe it is not being deployed strategically only, and that those who urge it in this case would not repeat it were they more in sympathy with the nominee or his philosophical orientation. . ..

[I]f these arguments against Mr. Smith should prevail it would have two dangerous consequences. It would limit more and more the administration of laws to zealots. And it would inhibit robust debate about the wisdom of laws, by using views expressed in such debates as weapons used deny the opportunity for public service on the basis of those views. The first danger would give us an administration of zealots; the second an administration of malleable non-entities.

In conclusion, I believe that Professor Smith's intelligence, his work ethic, his fairness, his knowledge of election law and—to quote from the statute: his ''experience, integrity, impartiality and good judgment'' will be a tremendous asset to the FEC and to the American taxpayers who have been forced to pay for unconstitutional FEC actions.

Professor Smith is a widely-respected and prolific author on federal election law, and, in my opinion, the most qualified nominee in the twenty-five year history of the Federal Election Commission. I wholeheartedly support his nomination to the bipartisan Federal Election Commission.

I yield the floor.

EXHIBIT 1

DUKE UNIVERSITY,
Durham, NC, April 1, 2000.

Senator MITCH MCCONNELL,
Chairman, U.S. Senate Committee on Rules and Administration, Washington, DC.

DEAR SENATOR MCCONNELL: I have found that one of the main principles of political sciences is that power, like nature, abhors a vacuum. The current reform measures being considered by the Congress, including the McCain-Feingold bill on campaign finance and ''soft money'' regulation, will have the opposite of their intended effects, which (apparently) is the restriction of the power of special interests. The problem is that weakening parties always increases the power of interest groups.

This opinion is widely held among social scientists, but the fact that so many people recognize the danger of legislation is not often recognized. As a way of bringing this fact to public notice, I have solicited the signatures of colleagues on the attached latter. Forty-five distinguished scholars of the political process, including six past Presidents of the Public Choice Society, have asked that I list their names as supporters. This I have done, and offer the attached open letter as a means of ensuring that the dangers of wrong-headed reforms can be prevented.

Sincerely,

MICHAEL C. MUNGER,
Professor of Political Science.

SCHOLARS' LETTER TO CONGRESS: WHY CAMPAIGN FINANCE ''REFORM'' IS ILL-ADVISED AND WILL NOT WORK

Senator MITCH MCCONNELL,
Chairman, Senate Rules Committee.

DEAR SENATOR MCCONNELL AND MEMBERS OF CONGRESS: Restrictions on campaign donations or expenditures do little to limit the total amount spent on campaign and make campaigns less competitive. Such rules entrench incumbents, force donations to take hidden forms, increase corruption through such mechanisms as ''straw donations,'' and make it more likely that wealthy candidates will win election.

Campaign finance restrictions are similar to price controls that deal with the symptoms rather than the reasons for the donations and are likewise doomed to fail. With campaign financing amounting to less than one-tenth of one percent of government expenditures, campaign spending does not seem large in either an absolute sense or relative to other product advertising. The restrictions force campaign expenditures to be spent in less effective ways and actually leave voters less well informed.

The McCain/Fiengold bill's provisions on parties making independent and coordinated expenditures on behalf of candidates, and prohibitions on issue advocacy that refers to a candidate, as well as restrictions on raising or spending ''soft money'' in connection with elections are typical of the rules that produce these problems. So called ''voluntary'' limits that restrict who can help certain candidates who violate certain rules are anything but voluntary.

The different forms contributions can take are essentially infinite and this makes regulation exceptionally difficult. For example, in the extreme case, it would be possible to buy up television and radio stations or newspapers to support particular candidates. Providing favorable new coverage for desired candidates would certainly benefit their candidacy, but it is difficult to see how these kinds of ''in-kind'' donations would be regulated.

We advise Congress, before enacting yet more new laws, to investigate whether many of the existing laws may have contributed to the problems we currently face. The new legislation is ill-advised.

Sincerely,

Professor Brandice Canes, Department of Political Science, Massachusetts Institute of Technology.

Professor William Fischel, Department of Economics, Dartmouth College.

Professor Michael Munger, Department of Political Science, Duke University.

Professor G. Patrick Lynch, Department of Government, Georgetown University.

Professor Jeffrey Milyo, Department of Economics, Tufts University.

Professor Otto Davis, W.W. Cooper University Professor of Economics and Public Policy, Carnegie Mellon University.

Professor John Matsusaka, Department of Finance and Business Economics, Marshall School of Business, University of Southern California.

Professor Price Fishback, Frank and Clara Kramer Professor of Economics, University of Arizona.

Professor Keith Poole, Professor of Political Economy, Research Director of the Donald H. Jones, Center for Entrepreneurship, Carnegie Mellon University.

Professor Vernon Smith, Regents' Professor of Economics, University of Arizona.

Professor Brian Roberts, Department of Government, The University of Texas at Austin.

Professor John Danford, Department of Political Science, Loyola University—Chicago.

Professor John R. Lott, Yale Law School.

Professor Joe Reid, Department of Economics, George Mason University.

Professor Mark Toma, Department of Economics, Unversity of Kentucky.

Professor Robert Tollison, Robert M. Hearin Professor of Economics, University of Mississippi.

Professor Daniel Sutter, Department of Economics, University of Oklahoma.

Jeffrey Jenkins, Department of Political Science, Michigan State University.

Professor Brian Gaines, Department of Political Science, University of Illinois.

Professor Jay Dow, Department of Political Science, University of Missouri.

Professor Geoffrey T. Andron, Department of Economics, Huston-Tillotson College.

Professor John Scott, Department of Economics, Northwest Louisiana University.

Professor Mathew McCubbins, Department of Political Science, University of California San Diego.

Professor Melvin Hinich, Mike Hogg Professor of State and Local Government, The University of Texas at Austin.

Professor Burton Abrams, Department of Economics, University of Delaware.

Professor Adam Gifford, Jr., Chairman, Department of Economics, California State University, Northridge.

Professor William Shugart, Barnard Distinguished Professor of Economics, University of Mississippi.

Professor Dean Lacy, Department of Political Science, The Ohio State University.

Professor Mark Crain, Center for the Study of Public Choice, George Mason University.

Professor Peter Calgano, Department of Economics, Wingate University.

Professor Chris Paul, Department of Economics, Armstrong Atlantic State University.

Professor Peter Ordershook, Division of Humanities and Social Sciences, California Institute of Technology.

Professor Gary Anderson, Department of Economics, California State University, Northridge.

Professor Mikhail Filipov, Department of Political Science, Washington University—St. Louis.

Professor Arthur Fleisher III, Department of Economics, Metropolitan State College of Denver.

Professor Steve Knack, Center for Institutional Reform, University of Maryland.

Professor Randy Simons, Director, Institute of Political Economy, Utah State University.

Professor Randall Holcombe, Department of Economics, Florida State University.

Professor Thomas Borcherding, Department of Economics, Claremont Graduate University.

Professor Dennis Halcoussis, Department of Economics, California State University, Northridge.

Professor James Endersby, Department of Political Science, University of Missouri.

Professor Brian Sala, Department of Political Science, University of Illinois.

Professor Elizabeth Gerber, Department of Political Science, University of California, San Diego.

Professor William Kaempfer, Department of Economics, University of Colorado at Boulder.

Professor Paul Zak, Department of Economics, Claremont Graduate University.

Professor Charles Rowley, Department of Economics, George Mason University.

Mr. MCCONNELL. I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, in the brief time I have remaining, I want to quickly respond to some of the remarks of the Senator from Kentucky.

First of all, the suggestion that the arguments on this side have relied on a caricature of the views of the nominee is simply false. We have been very cautious in the debate to simply rely on Professor Smith's actual words from his voluminous writings, and the Senator from Kentucky in no instance has denied that we accurately quoted Professor Smith. These are his views. There has been no distortion and no caricaturing of his views.

Second, the Senator denies the nominee's views on the campaign finance law will affect his ability to discharge his duties as an FEC Commissioner. Of course, I do not believe that people involved in the enforcment of laws have to accept the premise of every single law they are charged to enforce, but this nominee rejects essentially the entire campaign finance law of our country, from the notion dating back to 1907, that is still supposed to be good law today, that a corporation should not be able to give contributions in connection with federal elections, to the notion that labor unions should not be able to make such contributions, according to a 1947 law, to his rejection of the fundamental post-Watergate laws restricting the amounts that individuals can give candidates and parties that we are supposed to live under today. Professor Smith is essentially a campaign finance law anarchist. He does not believe we should have any campaign finance law. The notion that such a person should be on the FEC makes virtually no sense. To take the analogy of the Senator from Kentucky, he says having Professor Smith on the Commission will be like having a prosecutor who cares very much about people's constitutional rights. But the real analogy is that this nominee would be a prosecutor who believes we should repeal just about all of the U.S. Criminal Code. That, to me, is too much.

This is not about a litmus test. This is absolutely not about barring this gentleman from public service, as the Senator from Kentucky suggests. If he wants to run for the Senate and pass laws about campaign finance reform, there is an election for the Senate in Ohio this year. He can run. But if his job is to enforce the main body of campaign finance laws in this country, that job cannot be done by someone who believes those laws are entirely inconsistent with the first amendment and have no legal merit. Our election laws are too important to put them at risk in this way. For those reasons, I hope my colleagues reject this nomination.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. Mr. President, I ask unanimous consent that my time be counted against the time allocated to the opposition.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WELLSTONE. Mr. President, I will build on the comments of my colleague from Wisconsin. I heard the Senator from Kentucky talk about the fact that Brad Smith—and I said yesterday he is somebody I like and enjoy being with—has been critical of the Federal election laws. It is not just being critical. He has called the Federal Elections Campaign Act unconstitutional and undemocratic. That is more than just being critical.

I cannot remember a time when this body confirmed a nominee for any executive position whose own views were so completely at odds with the law he was meant to uphold.

Let me repeat that. That is what this debate is about. I cannot remember a time when this body confirmed a nominee for any executive position whose own views were so completely at odds with the law he was meant to uphold. He believes the Federal election law is unconstitutional and undemocratic.

I do not have the time today to summarize a complete position. I had a chance yesterday to speak about this nominee. I say to my colleagues, this vote is not just about Brad Smith; it is about whether or not the Senate is committed to reform. I do not think we give people in the country much confidence that we are committed to reform, that we are committed to passing legislation which will get some of this big money out of politics and which will lead to some authentic democracy as opposed to just democracy for the few, when we then turn around and confirm someone to the Federal Election Commission who does not even believe in any of this campaign finance reform. The Senate would be sending a terrible message to the country if we vote for this nominee.

I appreciate Brad Smith's right to express his views in writing and in person. He is articulate, he is intelligent, but we have a situation where we have a nominee who basically has said the Federal election laws are undemocratic, that they are unconstitutional, basically antithetical to all the values he holds dear about government and democracy.

Why in the world would we then want to confirm such a nominee and put him in a position of enforcing the very laws with which he is so at odds? To me it is a huge mistake. This is a vote about reform. This is a vote about Brad Smith. More importantly, it is a vote about whether or not we are serious about reform and getting some of the money out of politics and getting people back into politics.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I want to summarize the case against the confirmation of Professor Smith to the FEC.

My colleague from Kentucky yesterday stated Mr. Smith has been demonized. That is not true. I have criticized the nominee because I strongly disagree with his view that ''The most sensible reform is a simple one: repeal of the Federal Elections Campaign Act.''

I understand Professor Smith is not very old. In fact, Professor Smith could not have read the history or known about the abuses that took place in the 1972 campaign associated with the Watergate scandal which brought about the modern Federal Elections Campaign Act.

I strongly disagree with his conclusion that ''campaign reform is not about good government. It's about silencing people whose views are inconvenient to those with power. . . .''

Professor Smith goes on to say—these are his words:

> The real campaign-finance scandal has little to do with Senator Fred Thompson's investigation. The real scandal is the brazen effort of reformers to silence the American people.

I take strong exception to that view of history and the motivation of those of us and millions of decent men and women, honest men and women, who believe this situation needs to be cleaned up.

This morning's Washington Post has a story about ''MCI Center's Menu: Ribs and a Record Democratic Fundraiser:

> ''There is no donor fatigue, no Clinton fatigue, no Democratic fatigue,'' said an exhilarated Terence R. McAuliffe, who made 200 calls a day for seven weeks for his crowning achievement as Clinton's mean man in chief.
>
> McAuliffe used four telephones at a time—three for aides to dial, to put would-be donors on hold, and one for him to coo into his headset, bringing home the big-dollar bacon.
>
> The tribute has 21 vice chairs, who gave or raised $250,000; 42 Friends, who gave $100,000; and 32 hosts, who gave or raised $50,000. But what sets this dinner apart is the altitude of the top donor tier—the co-chairs, who each gave or raised $500,000.
>
> There are 26 of them, including 10 labor unions.

The article goes on:

> Another of the co-chairs is Senator Bob Kerrey (D-Neb.) who is not seeking reelection and will become president of New School University, in New York City. Kerrey said such efforts renew his commitment to campaign finance reform. ''When someone puts up half a million, you just cannot persuade people that they aren't getting something for it.''

Senator KERREY aptly described the situation that will take place at the dinner at the MCI Center: ribs and a record Democratic fundraiser, which is a record only because it exceeds the Republican fundraiser that recently was held where $24 million was raised.

If on the floor of this body 10 years ago I said there were going to be $500,000 donors, no one would give any credibility to that statement.

The Supreme Court also disagrees with Mr. Smith. We seem to be debating this issue of campaign finance reform and its validity in a vacuum because neither the Senator from Kentucky nor Mr. Smith seem to believe that, in January of the year 2000, the Court upheld Missouri campaign contribution limitations in a 6–3 opinion. The Court rejected Mr. Smith's premise that large contributions do not affect votes.

This is what Justice Souter wrote for the Court on the issue of the constitutionality of contribution limits:

In speaking of ''improper influence'' and ''opportunities for abuse'' in addition to ''quid pro quo'' arrangements, we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that Congress could constitutionally address the power of money ''to influence governmental actions'' in ways less ''blatant and specific'' than bribery.

In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of it that flowed from munificent campaign contributions. Even without the authority of Buckley there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and antigratuity statutes. While neither law nor morals equate all political contributions, without more, to bribes, we spoke in Buckley of the perception of corruption ''inherent in a regime of large individual financial contributions'' to candidates for political office . . . as a source of concern almost equal to ''quid pro quo'' improbity. . . . Leave the perception of impropriety unanswered and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works ''only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. . . .''

Mr. President, the event tonight, I promise you, has aroused amongst my constituents suspicions of malfeasance and corruption for any objective observer of the political process.

Justice Stevens, in his concurring opinion said:

Justice Kennedy suggests that the misuse of soft money tolerated by this Court's misguided decision in Colorado Republican Federal Campaign Committee v. Federal Election Commission, demonstrates the need for a fresh examination of the constitutional issues raised by Congress' enactment of the Federal Election Campaign Acts of 1971 and 1974 and this Court's resolution of those issues in Buckley v. Valeo. In response to his call for a new beginning therefore, I make one simple point. Money is property; it is not speech.

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.

Mr. President, we must consider this nomination, and the message it sends to the people of this country, in light of the reality of this year's campaign fundraising excesses.

Let me reiterate four points that summarize my opposition to Mr. Smith's nomination to become an FEC Commissioner.

He has long advocated the repeal of campaign finance regulation. How can he now take an oath to uphold and enforce the very laws he has so long sought to eliminate altogether?

He has continually argued the unconstitutionality of restraints on campaign finance regulation. His position has been that the Supreme Court erred in its Buckley v. Valeo opinion which upheld restraints on campaign contributions. Even as recently as his confirmation hearing in March, after the Supreme Court had again upheld campaign contributions limitations in the Missouri Shrink case, he neither acknowledged that most recent pronouncement of the Supreme Court, nor changed his viewpoint as to the constitutionality of contribution regulation. How can he now agree to uphold and enforce laws and regulations which he believes are unconstitutional?

Mr. President, I do not believe that we would confirm as EPA Administrator someone who advocated the repeal of environmental laws. I do not believe we would appoint an Attorney General who believes that the criminal laws are unconstitutional or a conscientious objector to be Secretary of Defense. Why should we confirm Mr. Smith as a Commissioner for the FEC?

Although he acknowledges the campaign finance abuses of the 1996 election, he sees nothing wrong with giving free rein to such activity by eliminating all campaign finance regulation.

If we would not conform as EPA Administrator someone who advocated the repeal of the environmental laws, nor confirm an Attorney General who believes that the criminal laws are unconstitutional, or a conscientious objector as the Secretary of Defense, why would we confirm Brad Smith as a Commissioner for the FEC?

Also in yesterday's debate, Senator MCCONNELL raised questions about the appropriateness of Danny McDonald, the choice of the Democrats as a nominee, to serve on the FEC. I appreciate the concerns that my colleague from Kentucky has raised. I totally concur that we should apply the standards equally for nominees to these most important positions. Based upon the issues Senator MCCONNELL has raised, I will rethink my position on Mr. McDonald, and vote against his confirmation as well.

Mr. President, I cannot speak more directly or frankly against this nominee. I urge my colleagues who have fought for campaign finance reform—my colleagues who believe in the need for integrity in our election system—to vote no on Brad Smith. As the New York Times said earlier this year:

A vote to confirm Mr. Smith is a vote to perpetuate big-money politics. . . . Mr. Smith does not belong on the FEC, and anyone in the Senate who cares about fashioning a fair and honest system for financing campaigns should vote against his appointment.

As chairman of the Commerce Committee, I have been involved with moving more nominees that almost any other Member of this body. I have allowed nominees to move forward, even when I disagreed with the nominee. But, Mr. President, this case is different.

I do not expect to agree with all the views of those nominated. But Mr. Smith's views are not just different from mine—again, a fact I would respect—they are radically different from 100 years of court and congressional precedence that some restrictions on campaign contributions are necessary to ensure the integrity of this body and the electoral process as a whole.

This is not just my opinion of the law. Let me read from Justice Breyer's concurring opinion, in which Justice Ginsberg joined, in the most recent pronouncement of the Supreme Court on campaign finance regulation—the Shrink Missouri PAC case:

If the dissent believes that the Court diminishes the importance of the first Amendment interests before us, it is wrong. The court's opinion does not question the constitutional importance of political speech or that its protection lies at the heart of the First Amendment. Nor does it question the need for particularly careful, precise, and independent judicial review where, as here, that protection is at issue. But this is a case where constitutionally protected interests lie on both sides of the legal equation. . . .

On the one hand, a decision to contribute money to a campaign is a matter of First Amendment—not because the money is speech (it is not); but because it enables speech. Through contributions the contributor associates himself with the candidates's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting votes of similarly minded voters. . . . both political association and political communication are at stake. . . .

On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action. . . . Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process . . . In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.

Unfortunately, the views of this nominee make him unfit to serve on the FEC. This is not, as I have stated, meant to be personal. I have nothing against Mr. Smith personally. I am sure he is a fine individual. But this body is constitutionally mandated to advise and consent on nominations. I take that role extremely seriously. And as such, I cannot support this nominee, and I urge my colleagues to do the same.

Mr. President, I yield back the remainder of my time.

Mr. MCCONNELL. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. CRAPO). Without objection, it is so ordered.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that all remaining time be yielded back on both sides.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCONNELL. Mr. President, I ask for the yeas and nays on the Smith nomination.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Bradley A. Smith, of Ohio, to be a Member of the Federal Election Commission? On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN) is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 64, nays 35, as follows:

[Rollcall Vote No. 107 Ex.]

YEAS—64

Abraham	Fitzgerald	Moynihan
Allard	Frist	Murkowski
Ashcroft	Gorton	Nickles
Baucus	Graham	Reid
Bennett	Gramm	Roberts
Bond	Grams	Roth
Breaux	Grassley	Santorum
Brownback	Gregg	Sessions
Bryan	Hagel	Shelby
Bunning	Hatch	Smith (NH)
Burns	Helms	Smith (OR)
Campbell	Hutchinson	Snowe
Chafee, L.	Hutchison	Specter
Cochran	Inhofe	Stevens
Collins	Inouye	Thomas
Coverdell	Jeffords	Thompson
Craig	Kyl	Thurmond
Crapo	Leahy	Torricelli
DeWine	Lott	Voinovich
Dodd	Lugar	Warner
Domenici	Mack	
Enzi	McConnell	

NAYS—35

Akaka	Feinstein	Lincoln
Bayh	Harkin	McCain
Bingaman	Hollings	Mikulski
Boxer	Johnson	Murray
Byrd	Kennedy	Reed
Cleland	Kerrey	Robb
Conrad	Kerry	Rockefeller
Daschle	Kohl	Sarbanes
Dorgan	Landrieu	Schumer
Durbin	Lautenberg	Wellstone
Edwards	Levin	Wyden
Feingold	Lieberman	

NOT VOTING—1

Biden

The nomination was confirmed.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the next votes in this series be limited to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

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NOMINATION OF DANNY LEE MCDONALD, OF OKLAHOMA, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION

The legislative clerk read the nomination of Danny Lee McDonald, of Oklahoma, to be a member of the Federal Election Commission.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Danny Lee McDonald, of Oklahoma, to be a member of the Federal Election Commission?

Mr. MCCONNELL. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN) is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 98, nays 1, as follows:

[Rollcall Vote No. 108 Ex.]

YEAS—98

Abraham	Feingold	Lugar
Akaka	Feinstein	Mack
Allard	Fitzgerald	McConnell
Ashcroft	Frist	Mikulski
Baucus	Gorton	Moynihan
Bayh	Graham	Murkowski
Bennett	Gramm	Murray
Bingaman	Grams	Nickles
Bond	Grassley	Reed
Boxer	Gregg	Reid
Breaux	Hagel	Robb
Brownback	Harkin	Roberts
Bryan	Hatch	Rockefeller
Bunning	Helms	Roth
Burns	Hollings	Santorum
Byrd	Hutchinson	Sarbanes
Campbell	Hutchison	Schumer
Chafee, L.	Inhofe	Sessions
Cleland	Inouye	Shelby
Cochran	Jeffords	Smith (NH)
Collins	Johnson	Smith (OR)
Conrad	Kennedy	Snowe
Coverdell	Kerrey	Specter
Craig	Kerry	Stevens
Crapo	Kohl	Thomas
Daschle	Kyl	Thompson
DeWine	Landrieu	Thurmond
Dodd	Lautenberg	Torricelli
Domenici	Leahy	Voinovich
Dorgan	Levin	Warner
Durbin	Lieberman	Wellstone
Edwards	Lincoln	Wyden
Enzi	Lott	

NAYS—1

McCain

NOT VOTING—1

Biden

The nomination was confirmed.

NOMINATION OF TIMOTHY B. DYK, OF THE DISTRICT OF COLUMBIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

The PRESIDING OFFICER. The clerk will report the next nomination.

The assistant legislative clerk read the nomination of Timothy B. Dyk, of the District of Columbia, to be United States Circuit Judge for the Federal Circuit.

Mr. LEAHY. Mr. President, yesterday some Republicans opposed Tim Dyk's confirmation to the Federal Circuit based on the workload of that court. Last evening I inserted in the RECORD a letter from the Chamber of Commerce that argued for his nomination in terms of the court's important workload and cases.

I am troubled that at a time when we are working through the night to try to preserve a digital signature bill to help encourage electronic commerce and protect consumers, when we are trying to work through Republican holds on the H1–B visa bill and increase the availability of high tech workers and improve training of American workers, when we are trying to improve on-line privacy and Internet security, I see such insensitivity to the needs of the Federal Circuit and its role in our economy and in our judicial system.

We designed the Federal Circuit to be our patent court. It has extraordinarily complex cases that are of increasing importance as our economy becomes more and more based on technological developments. Prompt and proper adjudication of cases before that court are in many ways critical to the continued growth of our economy and our economic future.

I see vacancies on that court as high priorities. I know that the other Democratic Senators share my view. I have been greatly troubled by the perpetuation of this vacancy on the Federal Circuit for more than two years while the Dyk nomination has been held back from Senate action. That is wrong. It is unfair to Tim Dyk and his family. It is short-sighted with respect to the important matters on the docket of the Federal Circuit.

That was the point of the Chamber of Commerce letter last August. Filling the vacancy on the Federal Circuit should be a priority of the Senate. The Federal Circuit should have all the resources it needs to do its job and resolve intellectual property disputes intelligently, fairly, and expeditiously.

Nonetheless, in spite of all these considerations and what I had hoped was a bipartisan commitment to the growth of our high tech economy, some are arguing that because its caseload numbers are not inflated by prisoner petition, criminal cases or scores of simple civil cases our nation's patent court ought not to have its needs fulfilled. I disagree.

Moreover, I have to wonder whether we would even be hearing that argument if a Republican President were